IN THE

Supreme Court of the United States

October Term, 1945

No. 517

DE A. SCHULTE, INC.,

Petitioner,

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, D. A. Schulte, Inc., respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Circuit Court of Appeals for the Second Circuit, rendered on July 20, 1945, which, by a divided court, reversed a judgment of the United States District Court for the Southern District of New York dismissing the respondent's complaint on the merits.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by Judicial Code, §240a, as amended, 28 U. S. C. §347 (a), 8 F. C. A., Title 28, §347 (a).

The opinion of the Circuit Court of Appeals for the Second Circuit was filed July 20, 1945. An order upon stipulation of the parties was made by the said court staying the mandate until October 20, 1945, pending the filing of this petition for certiorari.

Opinions Below

The opinion of the District Court is reported in 53 Fed. Supp. 844, and is also printed in the record (R. 309-314).

The majority opinion of the Circuit Court of Appeals and the dissenting opinion of Judge Chase appear in 150 Fed. (2) 694 and are also printed in the record (R. 322-328).

Questions Presented

The questions presented by this petition are:

1. Whether the Fair Labor Standards Act of 1938 (29 U.S.C., Section 201 *et seq.**) prohibits a *bona fide* settlement of claims for overtime compensation and statutory liquidated damages under Sections 7 (a) and 16 (b) of the Act (29 U.S.C., Secs. 207 (a), 216 (b)) where the settlement is made as the result of a *bona fide* dispute between an employer and its employees with respect to coverage under the Act, and the employees are paid under the settlement all the overtime compensation to which they would have been entitled had they been within the protection of the Act.

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* C. 676, 52 Stat. 1060, hereinafter referred to as the "Act".

2. Whether the employees may recover statutory liquidated damages and counsel fees under Section 16 (b) of the Act under a claim for non-payment of overtime under Section 7 (a) of the Act where it is found in a suit for such damages and counsel fees instituted after such *bona fide* settlement that the employees were not entitled to all the overtime compensation claimed and received by them because during a substantial part of the period for which they made such claim they were not within the protection of the Act.

If the answers to the foregoing questions are in the affirmative, then

3. Whether building maintenance employees are within the protection of the Act if the facts relied on to establish coverage of the employees show only that some of the tenants in the building receive, work on and return in intrastate commerce goods belonging to local owners who are not tenants of the building and that subsequently some of the said goods are sold and shipped by such non-tenant owners in interstate commerce, there being no proof either that at the time of production such tenants had any knowledge of the ultimate destination of the goods worked on by them or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of the completed goods in interstate commerce.

Statute Involved

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Section 201 *et seq.*) are set forth in the Appendix.

Statement

Respondent suing in behalf of himself and eighteen other building maintenance employees employed at petitioner's twenty-three story loft building at 571-583 Eighth Avenue, New York City, instituted this action against petitioner solely for the recovery of liquidated damages and counsel fees under Section 16(b) of the Fair Labor Standards Act of 1938 (29 U. S. C. 216(b)) in amounts equal to the sums which he and said other employees had previously been paid by petitioner upon the settlement of a dispute of claims for overtime compensation and such liquidated damages under Sections 7 and 16(b) of the Act, (29 U. S. C. Secs. 207, 216(b)).

Under the settlement, negotiated by respondent as the union representative of the said employees at the said building, petitioner paid each of the said employees an amount equal to the unpaid overtime compensation to which he would have been entitled if he were subject to the Act during the entire period for which such claims for overtime compensation and liquidated damages were made in the dispute, to wit, October 24, 1938, the effective date of the Act (29 U.S.C. 206(b)), to February 5, 1942. At the time such payments were received, respondent and said other employees executed and delivered to petitioner their releases of all further claims under the Act (R. 24-5, Def. Ex. A, R. 332-3).

At all times petitioner has denied its liability under the Act. Petitioner's answer to the complaint contained such denial and also affirmatively pleaded the defenses of accord and satisfaction and release. The Court below held that there was no coverage during a substantial part of the period in dispute (R. 326).

During the said period, the building in which respondent and the other employees worked as elevator operators, watchmen, handymen, mechanics, porters, etc., was occupied by upwards of ninety tenants (R. 47, Pl. Ex. 1, R.

329-332), a large number of whom were engaged in activities connected with the ladies' garment industry in New York City. Some of the tenants were so-called contractors who performed various kinds of labor—sewing or stitching, pleating and trimming or fabricating accessories—on and out of materials owned by and delivered to them by so-called garment manufacturers who had their offices, showrooms and shipping rooms elsewhere in New York City.

After completing their services, the materials were returned by the tenants to the manufacturers who either had other contractors finish the materials into completed garments or, if they were received in their completed state from the tenants, exhibited and sold them at wholesale, along with other garments worked on by other contractors.

A number of the tenants worked for several such local manufacturers while practically all of the manufacturers had several other contractors, not tenants of the building, also working on their goods.

The only relationship of the tenant-contractors to the manufacturers was that of independent contractors employed to do a specific production operation in the manufacture of garments from materials sent them by the manufacturer-owners.

Proof was made upon the trial that ultimately some of the garments worked on by some of the tenant-contractors were sold and shipped by the manufacturers in interstate commerce. But there was no proof that any manufacturer had a contract or order for the sale and shipment of any of the goods in interstate commerce, while they were in the contractor's possession.

In June, 1942, shortly after this Court held in *Kirschbaum* v. *Walling*, 316 U. S. 517, that the Act applied to maintenance employees of buildings where concededly the tenants were engaged in producing goods for interstate commerce, the maintenance employees at petitioner's building, through respondent and another employee represen-

tative of their union, which had a closed shop agreement with petitioner, demanded that petitioner pay them additional compensation for all time worked by them since October 24, 1938 in excess of the hours prescribed in Section 7(a) of the Act and an equal sum as liquidated damages under Section 16(b) of the Act (R. 29, 39, 276). Petitioner denied liability under the Act because the tenants in the building engaged in the garment trade were principally contractors who dealt only with New York City manufacturers (R. 274-5). The employees repeated their demands and upon being advised that petitioner would not pay, they threatened suit (R. 29, 276-7). Not desiring to go to the trouble and expense of litigating the issues involved in the dispute, petitioner offered to compromise and settle the dispute by paying to all of the employees all of the overtime compensation demanded for the entire period since October 24, 1938, the effective date of the Act, without the liquidated damages (R. 34, 278). After considering the offer and consulting with the local Wage and Hour Administrator's office and an official of their union (R. 25-6, 41), the employees accepted the offer (R. 34-37, 278). Petitioner thereupon paid all of the employees all of such overtime compensation as agreed and it received from each of the employees his duly executed release of all further claims under the Act (R. 279-281).

Seven months later the respondent who had negotiated the settlement, instituted this suit under Section 16(b) of the Act.

After trial without a jury, at which all of the facts bearing upon the disputed liability and all of the facts relating to the negotiation and consummation of the settlement were presented, the District Court found (R. 312):

> "* * * that there was a genuine dispute between the parties pertaining to a claim for compensation for a period long past; that the parties negotiating at arm's length, and without mistake, fraud or misrepresentation on either part and without over-

reaching, reached an accord and an agreement for the settlement of their dispute, that the amount agreed upon was an amount equal to the overtime compensation that would be payable if the Act applied without liquidated damages, and that such amount was received by the plaintiff(s) in satisfaction of the claim; that to evidence that transaction the plaintiffs executed and delivered to the defendant releases under seal and that such releases should be given effect unless the statute forbids."

The District Court held that neither the Act nor the public policy underlying the Act prohibits a settlement made in such circumstances as this settlement was made, "especially if the amount paid in settlement is at least equal to the unpaid over-time compensation", claimed by the employees (R. 313) and accordingly it sustained the defenses of accord and satisfaction and release and dismissed the complaint (R. 314).

Thus the District Court found it unnecessary to pass on the question of coverage "except to indicate that it presents a genuine issue with respect to which I am by no means certain that the plaintiffs have established a *prima facie* case", (R. 314), and in a footnote at this point in its opinion it set out the facts upon which it predicated its doubt on that issue.*

Upon appeal from the District Court's dismissal of the complaint, the Circuit Court of Appeals reversed (R. 322-6), one Judge dissenting (R. 327-8).

In reversing the District Court, the Circuit Court held (1) that the Act prohibits the *bona fide* settlement of a genuine dispute as to coverage and (2) that "for at least a part of the period involved" the employees were within the protection of the Act (R. 325). It found coverage for

* Upon the appeal below the facts in the said footnote were accepted by both sides as a finding, and are treated as such in the prevailing opinion of the Court below (R. 326).

twenty-five months and non-coverage for fourteen months of the period covered by the dispute and it remanded the case to the District Court for the purpose of computing the amount of the judgment to be entered against petitioner, the sums paid by petitioner on the settlement to be applied as partial payments on the amount found to be due for that part of the period involved during which the Circuit Court found that the Act applied to the building in suit.*

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* Petitioner's building had 150,000 square feet of rentable space, which was occupied by more than ninety tenants during the period in suit; October 24, 1938, to February 5, 1942 (Pl.'s Ex. 1, R. 329-332; Deft.'s Ex. F, R. 336B). The District Court found "by a generous appraisal of the testimony" that in 1939, 7.7% of the space was occupied by eight of such tenants engaged in the production of goods for interstate commerce, that in 1940, 8.2% of the space was occupied by such tenants and that in 1941, 10.3% of the space was occupied by such tenants (R. 314, footnote 1). In November, 1943, the Administrator of the Act adopted a standard of 20% of space occupancy for determining whether a substantial portion of a building is devoted to production for interstate commerce for the purpose of bringing building maintenance employees within the Act (Wage and Hour Division Release No. PR-19 [rev.], November 19, 1943). Applying the said standard to the District Court's findings the maintenance employees at petitioner's building were not subject to the Act at any time within the period in suit.

To the foregoing percentages of occupancy, the Circuit Court of Appeals added the percentages of total space occupied by twelve additional tenants claimed by respondent also to have been engaged in the production of goods for interstate commerce although the testimony concerning the said twelve tenants had been rejected by the District Court as being insufficient to support such a finding. Such addition brought the percentages of occupancy for the years 1940 and 1941 above the Administrator's 20% standard, and the Circuit Court therefore held that during those two of the more than 3 years involved the respondent and his fellow-employees were within the Act.

Upon the trial no evidence was offered that, at the times any of the additional twelve tenants worked on the goods belonging to manufacturers, such manufacturers had an order or agreement or contract for the shipment of the goods when completed in interstate commerce. The only testimony concerning sale and shipments in interstate commerce by the manufacturers related to sale and shipments made after the goods had been received from the twelve ten-

Specification of Errors to be Urged

The Circuit Court of Appeals erred as follows:

(1) On the first two questions

(A) In holding that an action may be maintained under Section 16 (b) of the Act by an employee solely for the recovery of liquidated damages after such employee has been paid upon the *bona fide* settlement of a *bona fide* dispute between him and his employer as to coverage under the Act, all the overtime compensation claimed and to which he would have been entitled had he been within the protection of the Act during the entire period for which he claimed such compensation.

(B) In holding that such an action may be maintained solely for the recovery of liquidated damages under Section 16 (b) of the Act after such employee has been paid upon such settlement of such *bona fide* dispute an amount

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ants. There was no testimony by the tenants that they knew or had reason to believe that the goods worked on by them would be shipped in interstate commerce.

Included among the said twelve tenants were four tenants as to whom there was absolutely no evidence that they knew, either at the time of production or at any time thereafter, or upon the trial, that the goods worked on by them either were to be or were shipped in interstate commerce. These four tenants were Max Schneider (R. pp. 107-8); Benjamin Weinstein (R. 130-1); Raizen & Trager (R. 167-8); Schrader & Bazarnick (R. 176-7). The aggregate of the percentage of total space occupied by these four tenants during the years 1940 and 1941 was 6.91% (Deft's Ex. F, R. 336 B).

If the 6.91% is excluded from the Circuit Court's computation there would be no coverage for 1940, and if there were no coverage for 1940, the amount paid on the settlement as overtime compensation for the entire period in suit—October 24, 1938, to February 5, 1942, —is found to be slightly in excess of twice the overtime claimed for the remaining period involved—the whole of 1941 and January, 1942. Therefore, even if it be assumed that during 1941 and January, 1942, the employees were within the Act, and that the *bona fide* compromise and settlement is invalid, petitioner would not be liable in any event under Section 16(b) of the Act (Schedule A to Complaint, R. 6, as modified by Stipulation, R. 16, 18).

more than he would have been entitled to had he been within the protection of the Act during the entire period for which he claimed overtime compensation but less than the full amount of such overtime compensation plus the liquidated damages.

(C) In holding that an employee and an employer may not settle and compromise a *bona fide* dispute between them as to coverage under the Act where upon such settlement the employee is paid by the employer all the overtime compensation which the employee claims to be entitled to under the Act and in consideration thereof the employee releases the employer from all further claims under the Act, including the claim for liquidated damages under Section 16(b) of the Act.

(D) In holding that the release of all further claims under the Act, executed and delivered by the employee to his employer at the time he received all of the overtime compensation claimed by him under the Act upon the *bona fide* settlement of the *bona fide* dispute with his employer as to coverage under the Act, is not a good defense to an action subsequently brought by such employee solely to recover liquidated damages, under Section 16(b) of the Act.

(E) In failing to give effect to the well-established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation where the statutory purposes have been fully accomplished.

(2) On the third question—

(A) In holding that building maintenance employees were within the protection of the Act where it is shown only that the tenants of the building received, worked on and returned in intrastate commerce goods belonging to local owners who were not tenants of the building and

that subsequently some of the said goods were sold and shipped by such non-tenant owners in interstate commerce, there being no proof that at the time of production such tenants of the building had any knowledge of the ultimate destination of the goods worked on by them or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of such goods in interstate commerce.

(B) In holding that under the circumstances recited in the foregoing paragraph the tenants of the building knew or had reasonable grounds to anticipate that such goods worked on by them would move into other States and that, therefore, they were engaged in the production of the goods for interstate commerce within the meaning of the Act.

Reasons Relied on for Granting the Writ

1. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

(A) The first two questions presented raise the precise issue which this Court expressly left undetermined in *Brooklyn Savings Bank* v. *O'Neil* and *Dize* v. *Maddrix*, 323 U. S. ——, 89 L. Ed. Ad. Op. 876, 886, namely, "what limitation, if any, §16 (b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a *bona fide* dispute between the two parties, in consideration of a *bona fide* compromise and settlement." The Court below has held that Section 16 (b) of the Act prohibits every such settlement if the dispute between the parties relates to coverage or, as the Court below stated it, "the law of the Act" (R. 325), even though the question of coverage under the Act presents what has been

described as "a molecular combination of fact and law which defies separation," *Berry* v. *34 Irving Place Corporation*, 52 Fed. Supp. 875, 881, and even if under the settlement the employee is paid all, or more than all, the overtime compensation he would have been entitled to had he been within the protection of the Act. There is no question of the *bona fides* of the dispute between the parties. The Court below itself has found that in the dispute between them each of the parties was partly right and partly wrong (R. 326). Neither is there any question of the *bona fides* of the settlement. It was made freely by the parties and only after respondent had communicated with the Wage and Hour Division and had consulted with and obtained the approval of an official of the union representing the employees (R. 25-6, 41).

The important consequences of the decision below to the vast number of employers and employees subject, or possibly subject, to the coverage of the Fair Labor Standards Act are apparent. Since no employer can, under the decision below, agree upon a settlement of a doubtful claim of liability under the Act without payment of an additional equal amount as liquidated damages, employees will in most of the doubtful cases of coverage be forced into the state and federal courts to litigate such questions to a final conclusion.

It is also important that the first two questions presented should be settled by this Court in order to clarify the confusion that has arisen because of this Court's recent approval, *per curiam*, of settlement stipulations in two cases pending before it after *certiorari* had been granted where the only questions presented dealt with coverage under the Act. *North Shore Corporation, Petitioner* v. *Barnett et al., id.* v. *Scott et al.*, 323 U. S. 679. The stipulations so approved by this Court provided that the employees should accept 66⅔% of the amounts of the judgments recovered by them below, said judgments being for minimum wages and overtime compensation found to

be due to the employees under Sections 6 and 7 of the Act and an equal amount as liquidated damages under Section 16(b) of the Act, *Overstreet et al. v. North Shore Corporation; Scott et al. v. id.*, 52 Fed. Supp. 503 (D. C. S. D. Florida); aff. *North Shore Corporation v. Barnett et al.*, 143 Fed. (2d) 172 (C. C. A. 5). It would seem that, if a controversy as to coverage under the Act could be settled while litigation is pending, it could be settled before suit was brought.

It is also important to the Administrator of the Act that the first two questions presented should be settled by this Court, because in extending coverage and resolving disputes as to coverage through proceedings instituted by the Administrator under the Act, employers could consent to coverage decrees in doubtful cases only upon pain of double liability. Here again, the result of the decision below is to open up the prospect of extensive litigation.

The decision below upon the first two questions presented also will have the result of reopening thousands of settlements involving millions of dollars, that heretofore have been made of borderline cases involving coverage under the Act. In his annual report for the fiscal year ended June 30, 1944, the Administrator states that in the five years and nine months that the Act then had been in force, about $70,000,000 in restitution of illegally withheld wages had been agreed to or ordered paid to almost 2,000,000 workers in about 90,000 establishments and that "several times this amount has probably been collected in addition over the period, through private action or *negotiation by employees and their unions* under a section of the Act which provides double penalty for failure to pay the minimum wage or time and a half overtime after 40 hours a week" (Emphasis ours). (Fair Labor Standards in Wartime, 3rd year, Annual Report, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, for the Fiscal Year Ended June 30, 1944, p. 10).

(B) The issue of coverage *presented* by the third question is also of great importance because it presents a situation unresolved by any of the prior decisions of this Court and affects many owners of multi-tenanted loft buildings and their maintenance employees. To date this Court has passed upon the question of coverage of such employees in three other common types of buildings:

(1) Where the tenants of a building are concededly engaged in manufacturing, selling and shipping of goods in interstate commerce. The maintenance employees of such a building are held to be covered by the Act because they have "such a close and immediate tie with the process of production" carried on by the tenants as to come within the Act. *Kirschbaum* v. *Walling*, 316 U. S. 517.

(2) Where the owner-occupant of the building is an interstate producer of goods and uses a substantial part of the building for its executive and administrative offices. Here, again, the building maintenance employees are covered by the Act because the offices are "part of an integrated effort for the production of goods" and such employees "stand in the same relation to production as did the maintenance workers in the A. B. Kirschbaum Co. case." *Borden Company* v. *Borella*, U. S. , 89 L. Ed. Ad. Op. 1240, 1243.

(3) Where substantial space in the building is used by numerous interstate producing concerns for their executive offices and sales agencies, such concerns being only tenants and not owners of the building. In such case, the employees are not covered by the Act because "running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods." *10 East Fortieth Street Building* v. *Callus*, U. S. , 89 L. Ed. Ad. Op. 1244, 1247.

In the building in the instant case the maintenance employees were several steps further removed from the

flow of goods in interstate commerce than were the maintenance employees in *Kirschbaum* v. *Walling*, *supra*, and in *Borden* v. *Borella*, *supra*. To hold that the building employees in the instant case came within the Act, removed as they were from the shipment in interstate commerce of the goods produced in the building, would, it is submitted, contravene the Congressional intent of the Act "* * * to leave local business to the protection of the states", *Walling* v. *Jacksonville Paper Co.*, 317 U. S. at 570 and "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation", *10 East Fortieth Street Building* v. *Callus*, U. S. , 89 L. Ed. Ad. Op. 1247.

The issue of coverage presented is also of great practical importance to the many owners and maintenance employees of multi-tenanted loft buildings in the heavily populated cities and states where goods produced by the industries in which the tenants of such buildings are engaged are consumed in great volume. As stated in the question presented, the tenant-contractors in such loft buildings are themselves not engaged in interstate commerce within the meaning of the Act. They neither receive goods from nor ship goods to other states. Their activities are wholly intrastate. Since the question as to whether the Act applies to the employees of a particular business is determined by the factual circumstances under which the particular business conducts its operations, *Kirschbaum* v. *Walling*, 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, the determination of whether a particular business is engaged in the production of goods for commerce within the meaning of the Act cannot be made by an *industrial* classification of "subject" industries, unless the decision of this Court in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 86, is to be interpreted to hold that if the proof establishes the "interstate character" of an industry, the employees of businesses closely identified with such an industry are automatically within the protection of the Act.

The holding by the Court below that the twelve additional tenants were interstate producers (R. 326) can be explained only upon the theory that the Court assumed that the proof established the interstate character of the New York City garment industry and that, therefore, the intentions, hopes or expectations of the non-tenant manufacturers to sell and ship their goods in interstate commerce were imputable to those of petitioner's tenants who were connected with the industry and in turn imputable to petitioner. But unlike the proof which established "the interstate character of the Texas oil industry," in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 86, 89-92, the only evidence in the instant case touching upon the nature of the New York City garment industry was that petitioner's building is located in the garment district of New York City, that it regularly rented factory space to contractors in the garment industry and that some of the non-tenant manufacturers for whom the contractors rendered services eventually shipped some of their goods in interstate commerce.

Clearly, a decision based upon an assumption of the interstate character of a local industry rather than upon the proof usually required, that the individual employer "ships or expects to ship goods across state lines," *United States* v. *Darby*, 312 U. S. 100, 125, raises a question that should be settled by this Court.*

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* In this context the Wage and Hour Administrator has interpreted the Act as follows:

> "Employers are engaged in the production of goods 'for commerce' where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. If, however, the employer does not intend or hope or have any reason to believe that the goods in production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the Act. The facts at the time that the goods are being produced determine whether an employee is engaged

2. The decision below is in conflict with a decision of another Circuit Court of Appeals on the first two questions presented. In *Brooklyn Savings Bank* v. *O'Neil*, 323 U. S. ——, 89 L. Ed. Ad. Op. 876, 883 (footnote 21), this Court recognized that there is a conflict in the various Circuits over the right to compromise claims under the statute in cases involving *bona fide* disputes. Among the cases cited by this Court as indicating such conflict was *Atlantic Co.* v. *Broughton*, 146 Fed. (2d) 480 (C. C. A. 5); certiorari denied 323 U. S. ——, 89 L. Ed. Ad. Op. 1001, in which case, upon the cross-appeals, the Circuit Court of Appeals for the Fifth Circuit held that a claim for liquidated damages under Section 16 (b) of the Act could be extinguished upon an agreement of accord and satisfaction if such agreement followed upon a *bona fide* dispute.

The decision below is also in conflict with the views of the Circuit Court of Appeals for the Third Circuit as to what this Court decided in *Brooklyn Savings Bank* v. *O'Neil*, *supra*. In *Watkins et al.* v. *Hudson Coal Co.*, 8 Wage and Hour Reporter 918, —— Fed. (2d) —— (decided September 5, 1945) the Third Circuit Court of Appeals, in distinguishing between a waiver of overtime compensation concededly due under the Act and a settlement of a *bona fide* dispute, said:

> "It is now authoritatively settled that a waiver by an employee, even by a release under seal, of his rights against an employer under the Act is not effective to bar him from subsequent assertion of those rights. Brooklyn Dime (*sic*) Savings Bank v. O'Neil, and its companion cases, —— U. S. —— [WHR 401] (1945) decide this, as do the flock of well considered

in the production of goods for commerce and not any subsequent act of his employer or of some third party. Of course, the fact that the goods do move in interstate commerce is strong evidence that the employer intended, hoped or had reason to believe that the goods would move in interstate commerce." Wage and Hour Division, Release No. R-113, paragraph 2, December 2, 1938, revised November, 1939.

cases in the District Courts and Circuit Courts of Appeal. But in the Dime (*sic*) Bank decision the Court indicated that other considerations might apply if the sum paid by an employer to an employee was the 'result of the settlement of a bona fide dispute with respect to coverage or amount.' *The inference is that if there were, between employer and employee, a dispute either as to whether an employee was covered by the Act or, if so, how much he had coming to him by reasons of the provision of the Act, settlement between the two parties of their dispute may, under proper circumstances, be upheld.*" (Emphasis ours.)

3. The Court below has decided a Federal question of law in conflict with the applicable decisions of this Court and has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The decision below, in dealing with the issues raised by the first two questions, constitutes a sharp departure from the generally accepted interpretation of those federal statutes which deal with the employer-employee relationship, that *bona fide* disputes of liability under such statutes may be compromised and settled. Although waivers of rights created under such statutes have been either expressly forbidden by Congress or prohibited by the courts, neither Congress nor the courts have refused to approve settlements of claims accruing under the statutes, where such settlements are arrived at by arm's-length negotiation between the parties and where no deception or coercion is placed upon the employee and the employee is fully apprised of his rights. Even a seaman who traditionally has been deemed a "ward of the admiralty" may release his claims under the federal statutes enacted for his protection (Seaman Act, 46 U.S.C., Secs. 597, 644; Jones Act, 46 U.S.C., Sec. 688) if such release is "executed freely without deception or coercion and * * * was made by the seaman with full

understanding of his rights." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239. See, also, *The S. S. Standard*, 103 Fed. (2d) 437 (C. C. A. 2). Notwithstanding a provision in the Federal Employers' Liability Act (45 U.S.C., Sec. 55) prohibiting waivers of liability created under the Act, settlements of accrued claims under the Act have been upheld in this Court, *Mellon* v. *Goodyear*, 277 U. S. 335, *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53,* and in the State Courts, *Griffin* v. *N. Y., N. H. & H. R. Co.*, 279 Mass. 511, *Patton* v. *Atchison, T. & S. F. R. Co.*, 59 Okl. 155; *Ballenger* v. *Southern R. Co.*, 106 S. C. 200; *Lindsay* v. *Acme Cement Plaster Co.*, 220 Mich. 367. In the Longshoremen's and Harbor Workers' Compensation Act Congress expressly provided that employees may settle, subject to the approval of the Commission, claims for permanent total disability and for temporary partial disability (33 U.S.C., Secs. 908(c) 21; 908(i)).

The decisive consideration in interpreting the foregoing statutes has been the protection of the employee. *Brooklyn Savings Bank* v. *O'Neil*, 323 U. S. ——, 89 L. Ed. Ad. Op. 876, 885, and as indicated by the foregoing cases, the employees are completely protected by the shifting of the burden of proof where the employer sets up a release or a settlement agreement as a defense to the employee's action. Such burden was fully discharged by petitioner in the instant case. As the dissenting opinion below states:

> "Here there was no overreaching by anybody and if ever parties to a real dispute as to liability may finally settle their differences on the basis of a fair compromise duly carried out as agreed that was done

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* However, in *Duncan* v. *Thompson*, 315 U. S. 1, 7, this Court seems to have placed some doubt on these two cases by its statement that "we need not here determine what limitations, if any, 35 (45 U. S. C. Section 55) places upon the validity of agreements not to sue if made in consideration of a *bona fide* compromise and settlement of claims arising under the act."

in this case. As the district judge well said in his opinion, 'The plaintiffs had the option of bringing suit and taking the risk of recovering nothing or avoiding that risk by the acceptance of a compromise proposal.' It seems to me that enlightened public policy ought to permit employees, competently advised as to their rights, to have and to exercise such an option whenever they have the desire and opportunity to do so in cases where the controversy as to liability is based on substantial grounds. I cannot believe, until and unless authoritatively so advised, that they must be restricted to an 'all or nothing' gamble."

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

D. A. SCHULTE, INC.,
Petitioner,

By EDWIN A. FALK,
ABRAHAM FRIEDMAN,
Counsel for Petitioner.

October 15, 1945.

APPENDIX

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. §201 et seq.) read as follows:

Sec. 3(j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compen-

sation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.